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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GREGORY COFFENG, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

VOLKSWAGEN AKTIENGESELLSCHAFT, AUDI AKTIENGESELSCHAFT AND VOLKSWAGEN GROUP OF AMERICA, INC.,

Defendants.

Case No. 3:17-cv-01825-JD

VOLKSWAGEN GROUP OF AMERICA, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: September 21, 2017
Time: 10:00 a.m.
Courtroom: 11
Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION TO DISMISS:

PLEASE TAKE NOTICE that on September 21, 2017 at 10:00 a.m., or as soon thereafter as this matter may be heard, before the Honorable James Donato in Courtroom 11 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, 94102, Defendant Volkswagen Group of America, Inc. will, and hereby does, move the Court for an order dismissing the Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 9(b).

VWGoA seeks dismissal of the Complaint on the grounds that Plaintiff fails to state any claim upon which relief can be granted and lacks Article III standing to pursue some of his claims.

This Motion to Dismiss is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support, the Complaint and matters incorporated or referenced therein, the Declaration of Robert Cameron, matters that may be judicially noticed, other documents filed in this case, and upon such other matters as may be presented to the Court at the time of the hearing.

Dated: August 14, 2017

Respectfully submitted,

Herzfeld & Rubin, P.C.

By: /s/ *Michael B. Gallub (Pro Hac Vice)*
ATTORNEYS FOR DEFENDANT
VOLKSWAGEN GROUP OF AMERICA, INC.

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STATEMENT OF ISSUES TO BE DECIDED PER CIVIL L.R. 7-4(a)(3)

1. Whether Plaintiff's first, second, third, and seventh causes of action for alleged breach of express warranty, implied warranty of merchantability, Magnuson-Moss Warranty Act, and unjust enrichment should be dismissed pursuant to the applicable statutes of limitations and for failure to allege facts plausibly stating a claim upon which relief can be granted.

2. Whether Plaintiff's fourth, fifth, and sixth causes of action under the Consumers Legal Remedies Act, Unfair Competition Law, and negligent misrepresentation, sounding in fraud, should be dismissed pursuant to the applicable statutes of limitations and for failure to plead said claims with the particularity required by Rule 9(b), and failure to allege facts plausibly stating a claim upon which relief can be granted under Rule 8.

3. Whether Plaintiff's eighth cause of action for injunctive and declaratory relief should be dismissed because it is not an independent cause of action, and whether Plaintiff lacks Article III standing to assert his injunctive relief claims.

STATEMENT OF RELEVANT FACTS AND PRELIMINARY STATEMENT

Plaintiff, a California resident, allegedly purchased a new 2011 Audi A4 (the "vehicle") from a California Audi dealer. Compl. ¶ 10. As reflected in the Retail Installment Sale Contract, attached as Exhibit B to the Cameron Declaration, Plaintiff purchased the vehicle on December 9, 2010. The Complaint alleges that the vehicle contained a "defective" water pump, which purportedly fails after the expiration of the 4-year/50,000 written express warranty but prior to what Plaintiff unilaterally declares to be the 120,000 mile "useful life" of the engine. Compl. ¶¶ 6, 42-43, n.7. While Plaintiff asserts a vague and conclusory allegation, without date(s), vehicle mileage or other details, that he purportedly complained about smelling engine coolant to an Audi dealer during the warranty period, *id*., ¶ 10, Plaintiff admits that the water pump failure occurred after the expiration of the warranty period. *Id*., ¶ 43.

All of Plaintiff's claims are barred by the applicable statutes of limitations. The longest statute of limitations for any of Plaintiff's claims is the four-year statute for breach of warranty claims and claims under California's Unfair Competition Law, both of which began to run at the time of purchase. Plaintiff commenced this action more than six years after he purchased his vehicle on December 9, 2010, rendering all of his claims time-barred. As explained in detail below, Plaintiff's conclusory allegations of tolling—which do not satisfy Rule 8 standards, let alone the heightened particularity requirements of Rule 9(b) where applicable—do not require a different result.

Plaintiff's claims also fail because this action is essentially an impermissible attempt to circumvent the 4-year/50,000-mile term of the New Vehicle Limited Warranty ("NVLW") provided with Plaintiff's vehicle and transform it into a "lifetime" warranty. Compl. n. 7; Cameron Decl. Ex. A, p.7. Plaintiff does not allege that the water pump of his, or any other Audi or Volkswagen vehicle, ever failed within its express warranty period. Although Plaintiff alleges that his vehicle "exhibited unmistakable symptoms (known only by the defendants) of degradation and impending premature failure" during the warranty period, his express warranty claim is foreclosed by his specific admission that his water pump functioned throughout the warranty period and did not fail until after its expiration. *See* Compl. ¶¶ 42-43.

Furthermore, Plaintiff does not and cannot allege that Defendant Volkswagen Group of America, Inc. ("VWGoA") ever stated that the subject vehicle, including its water pump, would function without incident and/or not need repairs for the so-called "lifetime" of the vehicle. Indeed, the Complaint admits that the water pump was covered only for the earlier of 4 years or 50,000 miles. Compl., at n.7. Despite the express limitations of the warranty, and in the absence of any affirmative contrary representations by VWGoA, Plaintiff relies on the allegation that "USA Warranty and Maintenance booklets for Class Vehicles have maintenance schedules that extend to 120,000 miles" and "[t]here is no scheduled maintenance or replacement recommended for…water pumps." Compl. at n.4. Plaintiff thus asserts—incredibly—that because the water pump system was not mentioned in a maintenance schedule, Defendant somehow guaranteed that it would never malfunction. It simply does not follow (and no reasonable consumer could conclude) that VWGoA affirmatively represented that the water pump would be impervious to wear or malfunction for 120,000 miles.

Nor does the Complaint plead facts sufficient to support a fraudulent omission claim. Plaintiff relies on design changes and complaints to the National Highway Traffic Safety Administration ("NHTSA")—which post-date Plaintiff's purchase of his vehicle—to suggest that VWGoA knew of and failed to disclose a defect in the water pump. First, Plaintiff pleads no facts as to how any redesign addressed any purported defect in the water pump and thus fails to demonstrate VWGoA's knowledge of any defect based on any redesign. Additionally, Plaintiff does not and cannot plead any facts demonstrating that VWGoA received or was aware of any complaints made to NHTSA or of any other consumer complaints regarding the subject vehicle's water pump before he purchased his vehicle.

In addition to statutory fraud claims and breach of express and implied warranty claims, the Complaint also asserts claims for violation of the Magnuson-Moss Warranty Act, negligent misrepresentation, unjust enrichment, and injunctive and declaratory relief. As demonstrated below, all of these claims, no matter how clothed, are transparent attempts to circumvent the written warranty and should be dismissed for the reasons discussed below.

ARGUMENT

I. THE EXPRESS WARRANTY CLAIM MUST BE DISMISSED

Plaintiff's claim for breach of express warranty premised upon the NVLW must be dismissed. The rule in California "is that an express warranty 'does not cover repairs made after the applicable time or mileage periods have elapsed.'" *Daugherty v. American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 830 (2006), quoting *Abraham v. Volkswagen of Am. Inc.*, 795 F.2d 238, 251 (2d Cir. 1986). Since the Complaint concedes that the subject water pump allegedly failed and needed replacement after the expiration of the applicable warranty period, Plaintiff's claim must be dismissed. Compl. ¶¶ 42-43; *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) ("The repairs in this case were made after the warranty period expired. Therefore, we affirm the dismissal of the express warranty claims."); *Elias v. Hewlett-Packard Co.*, 903 F. Supp. 2d 843, 850 (N.D. Cal. 2012). Plaintiff's allegation that Defendants "knew" of the alleged defect prior to sale does not save his barred claim. Compl. ¶ 70; *see Clemens*, 534 F.3d at 1022 (affirming dismissal of breach of express warranty claim even though plaintiff alleged that the defect "existed before the warranty expired, and that DaimlerChrysler had knowledge of the defect at the time of sale"); *Daugherty*,144 Cal. App. 4th at 830 ("[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. … [M]anufacturers … can always be said to 'know' that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage.").

Plaintiff cannot circumvent the dismissal of his claim by alleging the time and mileage limitations to be "unconscionable." Compl. ¶¶ 66. A contract or clause is unconscionable when it is both procedurally and substantively unconscionable. *Aron v. U-Haul Co. of Cal.* 143 Cal.

App. 4th 796, 808 (2006). Plaintiff fails sufficiently to allege either here. Procedural unconscionability focuses on "oppression and surprise," such as plaintiff's ability to review the terms of the contract and the existence of a meaningful choice at the time of contracting. *Id.*; *Resnick v. Hyundai Motor Am., Inc.*, 2016 U.S. Dist. LEXIS 160179, *25 (C.D. Cal. Nov. 14, 2016). The NVLW applicable to Plaintiff's vehicle is not procedurally unconscionable. Plaintiff does not and cannot allege that he lacked meaningful choices including brand, year, make, model, and warranties of vehicles available for purchase, or that he was deprived of the opportunity to read, review, and understand the warranty terms for the vehicle he purchased. *Resnick*, 2016 U.S. Dist. LEXIS 160179, at *26 (holding that where plaintiffs "do not plead that they lacked any other reasonable alternatives (i.e., other vehicles they could have purchased), or that the manufacturer failed to offer any extended warranty options, Plaintiffs fail to establish procedural unconscionability"); *Marchante v. Sony Corp. of Am., Inc.*, 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011) (rejecting claim of procedural unconscionability because "[p]laintiffs do not allege that they lacked other options for purchasing high-definition televisions"); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758, 771 (1989) ("the existence of meaningful alternatives available to such contracting party in the form of other sources of supply tends to defeat any claim of unconscionability").

Nor is the NVLW substantively unconscionable, where the agreement creates "overly harsh or one-sided results as to shock the conscience." *Aron*, 143 Cal. App. 4th at 808 (internal citations omitted). The 4-year/50,000 mile NVLW for Plaintiff's vehicle meets or exceeds similar warranties enforced by courts throughout the country, including courts in California. *Resnick*, 2016 U.S. Dist. LEXIS 160179, at *27 (enforcing 3-year/36,000 mile warranty); *Smith v. Ford Motor Co.*, 749 F. Supp. 2d 980, 993-94 (N.D. Cal. Sep. 13, 2010) (same).

The express warranty claim must also be dismissed because the NVLW covers only repairs "to correct a defect in *manufacturer's material and workmanship*." Cameron Decl., Ex. A, at p. 7 (emphasis added). Such language does not cover purported design defects. *See Troup v. Toyota Motor Corp.*, 545 F. App'x. 668, 668 (9th Cir. 2013) ("The Toyota Prius's alleged design defect does not fall within the scope of Toyota's Basic Warranty against 'defects in

materials or workmanship,'" as "express warranties covering defects in materials and workmanship exclude defects in design."). Plaintiff's allegations that the purported water pump defect existed in every putative class vehicle is necessarily a design defect claim not covered under the express terms of the applicable NVLW. Compl. ¶ 1; *Sloan v. Gm LLC*, 2017 U.S. Dist. LEXIS 120851, *29-30 (N.D. Cal. Aug. 1, 2017); *Gertz v. Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 94183, *10-11 (C.D. Cal. Aug. 22, 2011) (dismissing, in a putative class action, express warranty claim where applicable warranty covered "repairs or adjustments for defects in materials or workmanship" -- i.e., a manufacturing defect-- because defect allegedly shared by all putative class vehicles constitutes a design defect).

The Complaint also purports to allege a breach of express warranty premised upon various vague, subjective and generalized statements in VWGoA's advertising campaigns, such as "superior in construction," "superior design and manufacture," and "safety," which make no representation concerning the vehicle's water pump. Compl. ¶ 107. Such alleged statements constitute, at most, non-actionable puffery which does not create an express warranty. *Smith v. LG Elecs. U.S.A., Inc*, 2014 U.S. Dist. LEXIS 31577, *16 (N.D. Cal. March 11, 2014) (words regarding "safety" and "fitness for use" are vague and general and thus nonactionable). In addition, the Complaint does not allege that Plaintiff saw or read such advertisements, much less relied upon them. *See Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 979 (C.D. Cal. 2014) (dismissing express warranty claim premised on language in a marketing brochure "because plaintiffs do not allege that they read or relied on the 'marketing brochure' before making their purchases").

Finally, Plaintiff's express warranty claim is time barred. An action for breach of warranty is governed by a four-year statute of limitations that begins when tender of delivery is made "regardless of the aggrieved party's lack of knowledge of the breach." Cal. Comm. Code § 2725. Plaintiff purchased his vehicle on December 9, 2010. *See* Cameron Decl., Ex. B. Since this action was commenced on March 31, 2017, more than four years later, Plaintiff's claim is time barred. Plaintiff cannot avail himself of the exception provided for warranties that explicitly extend to future performance, pursuant to which a claim accrues "when the breach is or should

have been discovered," Cal. Comm. Code § 2725. Even if the NVLW "explicitly extends to future performance," Plaintiff fails to plead when he discovered the alleged defect, or that he even discovered the alleged defect within four years of commencing this action. *See Durkee v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 177339, *15 (N.D. Cal. Dec. 24, 2014) (holding that to rely on discovery toll, plaintiff "must specifically plead facts showing the time and manner of discovery and the inability to have made earlier discovery despite reasonable diligence"). In addition, as discussed *infra*, § IV, Plaintiff has failed to plead the requisites for a fraudulent concealment toll.

II. THE IMPLIED WARRANTY CLAIM MUST BE DISMISSED

Plaintiff's implied warranty claim fails because the implied warranty applicable to his vehicle does not extend beyond the 4-years/50,000 mile NVLW, and, as discussed, *supra*, Plaintiff does not allege that his water pump failed within this warranty period. *See* NVLW, Ex. A to Cameron Decl. at p. 9, which states: "Any implied warranty . . . is limited in duration to the stated period of these written warranties." *See also* Cal. Comm. Code § 2316.

The claim also fails for lack of vertical privity—a prerequisite for recovery under the implied warranty provision of the California Commercial Code. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008); *Gonzales v. Mazda Motor Corp.*, 2017 U.S. Dist. LEXIS 2318, *9 (N.D. Cal. Jan 5, 2017). The Complaint alleges that Plaintiff purchased his vehicle not from VWGoA, but from an authorized California dealership. Compl. ¶ 10. Plaintiff cannot dodge the privity requirement by conclusorily alleging that he is a third-party beneficiary of some undefined "contract implemented by the defendants" because no such exception to the privity rule exists under California law. Compl. ¶128; *Gonzales*, 2017 U.S. Dist. LEXIS 2318, at *9-10; *In re Seagate Tech. LLC Litig.*, 2017 U.S. Dist. LEXIS 18745, *20-22 (N.D. Cal. Feb. 9, 2017). Moreover, even if such an exception were to apply, Plaintiff has failed to invoke it as the Complaint fails to even allege the parties to the so-called "contract," let alone describe the contract under which he claims to be an intended beneficiary. *Kirsopp v. Yamaha Motor Co. Ltd.*, 2015 U.S. Dist. LEXIS 68639, *19 (C.D. Cal. Jan. 7, 2015) (rejecting attempt to circumvent privity requirement where Complaint alleged Plaintiffs are "intended third party beneficiaries of

any contract for sale that takes place between Yamaha and its authorized dealers" because Plaintiffs "do not provide specific allegations identifying or describing the agreements under which [they] claim third party beneficiary status").

Finally, claims for breach of implied warranty under the Commercial Code are subject to a four-year limitations period running from "tender of delivery" "regardless of the aggrieved party's lack of knowledge of the breach." Cal. Comm. Code § 2725. As Plaintiff purchased his vehicle in December 2010, his implied warranty claim is time barred. *See Durkee v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 177339, *12 (N.D. Cal. Dec. 24, 2014) (implied warranty claim time barred, since implied warranties are not subject to delayed accrual until discovery); *Cardinal Health 301, Inc. v. Tyco elec. Corp.*, 169 Cal. App. 4th 116, 134 (2008).

III. PLAINTIFF'S MAGNUSON-MOSS WARRANTY ACT CLAIM FAILS

A Magnuson-Moss Warranty Act ("Magnuson-Moss") claim is entirely derived from state warranty law. *In re Sony PS3 Other OS Litig.*, 551 F. Appx. 916, 920 (9th Cir. 2014). Since Plaintiff has failed to state a breach of warranty claim under California law, his derivative Magnuson-Moss Warranty Act claim must be dismissed as well. *Troup v. Toyota Motor Corp.*, 545 Fed. Appx. 668, 669 (9th Cir. 2013).

IV. PLAINTIFF'S CLRA AND UCL CLAIMS MUST BE DISMISSED

A. Plaintiff's CLRA and UCL Claims are Time Barred

Claims under the CLRA and UCL are governed, respectively, by three-year and four-year statutes of limitations running, at the latest, from the date in which Plaintiff purchased his vehicle. *Keilholtz v. Lennox Hearth Prods.*, 2009 U.S. Dist. LEXIS 81108, *8 (N.D. Cal. Sep. 8, 2009). As this action was commenced more than four years after Plaintiff purchased his vehicle in 2010, these claims are untimely.

Plaintiff's reliance on the delayed discovery rule and fraudulent concealment to toll the statute of limitations is not supported by any facts alleged in the Complaint. In order to invoke the delayed discovery rule, plaintiff must plead facts showing (1) the time and manner of discovery, and (2) the inability to have discovered the alleged defect earlier despite reasonable

diligence. *Keilholtz*, 2009 U.S. Dist. LEXIS 81108, at *9; *Saliter v. Pierce Brothers Mortuaries*, 81 Cal. App. 3d 292, 297 (Cal. Ct. App. 1978). None of these facts has been pled in this case. The Complaint fails to plead when the alleged defect was purportedly discovered, or even that Plaintiff discovered the alleged defect within four years of commencing this action. *See McCarn v. HSBC USA, Inc.*, 2012 U.S. Dist. LEXIS 162257, *28 (E.D. Cal. Nov. 9, 2012) (holding that because "Plaintiff fails to allege the time or manner of discovery at all other than that it was made with the assistance of counsel," plaintiff has failed to invoke the delayed discovery toll).

Similarly, to establish fraudulent concealment, the complaint must factually plead "(1) when the fraud was discovered; (2) the circumstances under which it was discovered; (3) and that plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Keilholtz*, 2009 U.S. Dist. LEXIS 81108, at *14. As discussed above, the Complaint fails to allege these requisite facts. Moreover, the factual basis for a fraudulent concealment toll must be pled with particularity under Rule 9(b), which is completely absent here. *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1132 (C.D. Cal. May 24, 2010); *Kay v. Wells Fargo & Co. N.A.*, 2007 U.S. Dist. LEXIS 55519, *13 (N.D. Cal. July 24, 2007).

In addition, only affirmative and active concealment—not simply mere omission or nondisclosure—can toll the statute of limitations based on fraudulent concealment. *Yumul*, 733 F. Supp. 2d at 1131. Plaintiff's only arguable "affirmative conduct" allegation is that defendants "fraudulently attributed the failings of . . . water pumps to other factors and/or exculpating conditions for which the defendants had no responsibility." ¶ 30. However, this allegation is wholly conclusory with no supporting factual averments establishing the required "who, what, when, where, and how" of the alleged fraudulent concealment. The Complaint fails to allege the specific content of the misrepresentations, when these misrepresentations were allegedly made, which Defendant allegedly made these statements, or that Plaintiff was even the recipient of any such alleged misrepresentation.

Finally, only active conduct "above and beyond the wrongdoing upon which the plaintiff's claim is filed" can toll the statute of limitations. *Kirsopp v. Yamaha Motor Co.*, 2015

U.S. Dist. LEXIS 68639, *12 (C.D. Cal. Jan. 7, 2015); *see Kay*, 2007 U.S. Dist. LEXIS 55519, at *13. Here, Plaintiff's allegations of fraudulent concealment also partially form the basis for his consumer-fraud claims, and, thus, the fraudulent concealment toll is not available for this reason alone.

B. Plaintiff's CLRA and UCL Claims Fail to Satisfy Rule 9(b)

Plaintiff's CLRA and UCL claims, premised on allegations of misrepresentation and concealment or nondisclosure, must satisfy the heightened pleading requirements of Rule 9(b). Plaintiff's Complaint fails to allege the "who" "what," "when," "where" and "how" of any alleged fraudulent conduct, as it must to pass muster under Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009); *Richards v. Safeway Inc.*, 2014 U.S. Dist. LEXIS 143936, *4 (N.D. Cal. Sep. 22, 2014) (Donato, J.).

Plaintiff alleges that Defendants violated the CLRA and UCL by "misrepresenting the supposed quality and reliability attributes of" the subject vehicles. Compl. ¶ 160. However, the Complaint fails to set forth the particulars of any such misrepresentation allegedly made by VWGoA. The Ninth Circuit has held that to satisfy Rule 9(b), a complaint sounding in fraud must plead the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Harris v. Bank of Am., NA,* 596 Fed. Appx. 581, 583 (9th Cir. 2015). The Complaint contains no such facts. Moreover, the Complaint fails to allege the existence of any representation made by VWGoA relating to the vehicle's water pump, let alone anything untruthful. *See Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962, 974 (C.D. Cal. 2014) (dismissing CLRA claim because plaintiffs "failed to identify any statement made by Toyota that misrepresents the performance of [the] automatic pre-collision braking feature"); *Berenblat v. Apple, Inc.*,2009 U.S. Dist. LEXIS 80734, *20 (N.D. Cal. Aug. 21, 2009) (dismissing claim where the "complaint does not allege that Apple made any specific representation with respect to" the alleged defect).[1]

[1] To the extent that Plaintiff's CLRA and UCL claims rely on vague buzzwords allegedly gleaned from advertisements–none of which are alleged to have been read or relied upon by Plaintiff—the claims must be dismissed as non-actionable puffery. *See* Point I, *supra; Smith v. LG Elecs. U.S.A., Inc.*, 2014 U.S. Dist. LEXIS 31577, *16 (N.D. Cal. Mar. 11, 2014).

Likewise, Plaintiff cannot legitimately assert that Defendants represented that the water pump would last for what Plaintiff conclusorily refers to as its "reasonably expected useful life" simply because it was not mentioned in the maintenance schedule. Compl. ¶ 6, n. 4; *see, e.g.*, *Competitor Liaison Bureau, Inc. v. Cessna Aircraft Co.*, 2011 U.S. Dist. LEXIS 38656, at *14 (M.D. Fla. Apr. 8, 2011) (rejecting argument that manufacturer's inspection and maintenance recommendations for *some* aircraft components provide a specific warranty as to the useful life of the aircraft or other components); *Sears, Roebuck & Co. v. Tyco Fire Prods. LP*, 833 F. Supp. 2d 892, 899 (N.D. Ill. 2011) (An "agree[ment] to inspect…sprinklers [following 50 years of use] in accordance with certain [statutory] standards is not the equivalent of an express written warranty of the sprinkler head's useful life"). The vehicle contains many component parts that are not specifically discussed in the maintenance schedule, yet nothing there, or in the NVLW which sets forth the time/mileage limitations within which parts are to be covered, represents or even suggests that all such components, including the water pump, are guaranteed not to fail or require repair throughout the entire life of the vehicle. Plaintiff's improper attempt to premise a CLRA or UCL claim on the allegation that the maintenance schedule, which merely recommends service to certain vehicle components at certain intervals, somehow implicitly represents that every 2011 Audi A4 vehicle has a "useful life" of at least 120,000 miles before which it or any of its component parts will not require repair, cannot stand, *Sears, Roebuck & Co.*, 833 F. Supp. 2d at 899, and would render meaningless the terms and limitations of the NVLW.

Plaintiff's failure to disclose/omission-based claim fares no better. To "plead the circumstances of omission with specificity, plaintiff must describe the content of the omission and where the omitted information should or could have been revealed, as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information." *Palmer v. Apple Inc.*, 2016 U.S. Dist. LEXIS 51823, *14 (N.D. Cal. Apr. 15, 2016). As Plaintiff fails to identify any specific advertisement or representation by VWGoA that he relied upon to make his purchase

that failed to include the allegedly omitted information, the CLRA and UCL omission-based claims must be dismissed.

C. Plaintiff's UCL and CLRA Claims Seek Solely Equitable Relief and Must Be Dismissed Because Plaintiff Has Pleaded Remedies at Law and Lacks Standing

The UCL only provides for equitable relief, *i.e.*, restitution and injunctive relief. *See Fonseca v. Goya Foods, Inc.*, 2016 U.S. Dist. LEXIS 121716, at *20 (N.D. Cal. Sep. 8, 2016). Similarly, Plaintiff's CLRA claim only seeks injunctive relief. Compl. at n.2 ("With respect to the California CLRA claim, California plaintiffs only assert a claim for injunctive relief"). "A plaintiff seeking equitable relief must establish that there is no adequate remedy at law available." *Durkee v. Ford Motor Co.*, 2014 U.S. Dist. LEXIS 122857, at *6 (N.D. Cal. Sep. 2, 2014). Here, Plaintiff's Complaint fails to allege the absence of an adequate remedy at law. In fact, it asserts three breach of warranty claims, thereby alleging the existence of an adequate remedy at law. As such, Plaintiff's claims for relief under the UCL and CLRA must be dismissed. *See Fonseca v. Goya Foods, Inc.*, , 2016 U.S. Dist. LEXIS 121716, at *21 (N.D. Cal. Sep. 8, 2016) (dismissing UCL, FAL, and CLRA claim seeking equitable relief because plaintiff has an adequate remedy at law in her other claims); *Moss v. Infinity Ins. Co.*, 2016 U.S. Dist. LEXIS 91757, at *22 (N.D. Cal. July 14, 2016) (dismissing UCL claim and noting this is the correct result "even if all of plaintiff's non-UCL claims ultimately fail"); *Bird v. First Alert, Inc.*, 2014 U.S. Dist. LEXIS 176390, at *15 (N.D. Cal. Dec. 19, 2014); *Durkee*, 2014 U.S. Dist. LEXIS 122857, at *6 (same).

Plaintiff also lacks standing to claim injunctive relief under the CLRA and UCL. To state a claim for injunctive relief, Plaintiff must plead facts demonstrating that she "faces 'a real or immediate threat of an irreparable injury.'" *Perez v. Nidek Co.*, 711 F.3d 1109, 1114 (9th Cir. 2013). Plaintiff, who alleges that his economic injury already occurred and that he has already replaced his water pump, has not done so here. *See Richards v. Safeway Inc.*, 2014 U.S. Dist. LEXIS 143936, *8 (N.D. Cal. Sep. 22, 2014) (Donato, J.). In any event, the possibility of damages arising out of future repair costs does not support the granting of injunctive relief. *See Park-Kim v. Daikin Indus.*, 2016 U.S. Dist. LEXIS 158056, *46 (C.D. Cal. Nov. 14, 2016).

D. Plaintiff Fails to Adequately Plead that VWGoA Knew of the Alleged Defect at the Time of His Purchase

Under the "CLRA and UCL, 'plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss."' *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1137 (N.D. Cal. 2013); *see Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012) ("The failure to disclose a defect that a manufacturer does not have a duty to disclose, *i.e.*, a defect of which it is not aware, does not constitute an unfair or fraudulent practice" under the UCL.). The Complaint is devoid of any well-pleaded facts demonstrating that VWGoA was aware of the alleged defect at the time of Plaintiff's purchase in December 2010.

Plaintiff's allegations of knowledge are premised on consumer complaints to NHTSA, pre-release testing data and warranty claims, and the alleged revision of the specifications for the water pump. Compl.¶¶ 25, 26, 34, 38, 56. None of these allegations impute knowledge to VWGoA at the time of sale in 2010. First, all alleged NHTSA complaints post-date the sale of the subject vehicle, with the earliest complaint appearing in 2013. Compl. ¶ 26; *see Callaghan v. BMW of North America, LLC*, 2014 U.S. Dist. LEXIS 164290, *11 (N.D. Cal. Nov. 21, 2014) (Donato, J.) (rejecting knowledge based upon NHTSA complaints that post-date the relevant purchases); *see also Baba v. Hewlett Packard Co.*, 2011 U.S. Dist. LEXIS 8527, at *10 (N.D. Cal. Jan. 28, 2011) (holding that awareness of a few customer complaints, even dated and posted on defendant's website, "does not establish knowledge of an alleged defect").

Second, the FAC's conclusory allegations of knowledge due to internal pre-release testing data and warranty claims are insufficient. *See Burdt v. Whirlpool Corp.*, 2015 U.S. Dist. LEXIS 102761, *11-12 (N.D. Cal. Aug. 5, 2015) (rejecting allegations of knowledge based upon pre-release testing as "merely speculative," and specifically noting that "the fact that the alleged defect did not appear until eleven months after purchase suggests that the pre-release testing may not have revealed an alleged defect that only appeared after such extended use"); *Grodzitsky v. Am. Honda Motor Co.*,2013 U.S. Dist. LEXIS 33387, *18 (C.D. Cal. Feb. 19 2013) (rejecting "knowledge" and "duty to disclose" allegations premised on claim that Honda knew of a defect

based on "pre-release testing data, early consumer complaints to Honda and dealers, testing done in response to complaints, replacement part sales data, aggregate data from Honda dealers, and other internal sources").

Finally, the conclusory allegation of knowledge based upon an upgrade or revision to the subject water pump (Compl. ¶¶ 34, 38) is of no moment because the Complaint fails to plead that any such upgrade prior to the sale of Plaintiff's vehicle addressed any problem that plaintiff has identified with the water pump. Thus, the alleged redesign or change does not demonstrate VWGoA's knowledge of the alleged defect at the time of Plaintiff's purchase. *See Sloan v. GM LLC*, 2017 U.S. Dist. LEXIS 120851, *23 (N.D. Cal. Aug. 1, 2017) (rejecting claim of "knowledge" based upon a redesign of the engine where there was no specific allegation that GM redesigned only the "allegedly defective component").

E. Plaintiff Fails to Adequately Plead Reliance

Plaintiff's CLRA and UCL claims must also be dismissed because the Complaint fails to plead any facts, much less particularized facts, establishing reliance—a deficiency that applies with equal force regardless of whether the UCL claims are predicated upon "unfairness," "fraud" or "unlawfulness."[2] *See Myers v. BMW of N. Am., LLC*, 2016 U.S. Dist. LEXIS 140768, at *16 (N.D. Cal. Oct. 11, 2016) (CLRA and UCL claims require "actual reliance"); *Ehrlich v. BMW of N. Am., LLC*, 801 F. Supp. 2d 908, 919 (C.D. Cal. Aug. 11, 2010). As discussed, the Complaint fails to identify any specific misrepresentation relating to the vehicle's water pump in any publication or advertisement issued by VWGoA, let alone a misrepresentation that Plaintiff saw or relied upon prior to purchase. *See McKinney v. Google, Inc.*, 2011 U.S. Dist. LEXIS 97958, *15-16 (N.D. Cal. Aug. 30, 2011) (holding "that the mere assertion of 'reliance' is insufficient" and that "plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance").

[2] Plaintiff's claim under the UCL's "unlawful" prong must also be dismissed because, as demonstrated herein, Plaintiff has failed to sufficiently allege a cause of action for breach of warranty or under the CLRA. Compl. ¶ 159; *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 557 (9th Cir. 2010).

Similarly, to prove reliance on an omission, Plaintiff must show that "had the omitted information been disclosed, one would have been aware of it and behaved differently." *Myers*, 2016 U.S. Dist. LEXIS 140768, at *17; *Hall v. Sea World Entm't, Inc.*, 2015 U.S. Dist. LEXIS 174294, *20 (S.D. Cal. Dec. 23, 2015). Because Plaintiff does not allege that he reviewed any website or brochure from VWGoA prior to purchase, or that he had any specific interaction with any authorized representative or sales associate at the dealership at which he purchased his vehicle, he cannot plausibly plead that he "would have been aware of" the alleged defect if disclosed. *See Myers*, 2016 U.S. Dist. LEXIS 140768, at *19-20 (dismissing CLRA and UCL claims, including "unfair" prong claim, for failure to plead reliance); *Hall*, 2015 U.S. Dist. LEXIS 174294, at *20; *Ehrlich*, 801 F. Supp. 2d at 919-20.

V. PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM FAILS

Plaintiff's negligent misrepresentation claim fails for several reasons. First, negligent misrepresentation claims are subject to a two-year statute of limitations, which expired years before this action was commenced. *See Yamauchi v. Cotterman*, 84 F. Supp. 3d 993, 1010 (N.D. Cal. Mar. 24, 2015). As discussed *supra*, Plaintiff failed to plead the requisites for a discovery or fraudulent concealment toll. Second, the elements of a negligent misrepresentation claim are "(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Id.* Here, as discussed *supra*, the Complaint fails to allege any affirmative misrepresentation by VWGoA relating to the subject water pump, let alone with the particularity mandated by Rule 9(b). *See id.* at 1019 (noting that negligent misrepresentation claims require an affirmative representation and cannot be based on nondisclosure). Finally, Plaintiff's negligent misrepresentation claim seeking only pure economic damages is barred by the economic loss doctrine. *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 820 (N.D. Cal. Aug. 20, 2014) (negligent misrepresentation claim barred by economic loss rule because plaintiff "failed to allege any personal injury or property damage or special relationship").

VI. PLAINTIFF'S UNJUST ENRICHMENT CLAIM FAILS

Under California law, a claim for unjust enrichment is unavailable where the parties are bound to an express contract, which, in this case, is the 4-year/50,000 mile limited express warranty. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (Cal. Ct. App. 2010) ("As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract."). Moreover, where adequate remedies at law exist, equitable remedies such as restitution for unjust enrichment are not permitted. *See Fonseca v. Goya Foods, Inc.*, 2016 U.S. Dist. LEXIS 121716, *20-21 (N.D. Cal. Sep. 8, 2016). As Plaintiff does not, and cannot, plead that he has no adequate remedy at law, his claim for unjust enrichment must fail. Finally, unjust enrichment claims are subject to a three-year statute of limitations. *Keilholtz v. Lennox Hearth Prods.*, 2009 U.S. Dist. LEXIS 81108, *8 (N.D. Cal. Sep. 8, 2009). Because the statute of limitations is not subject to any tolling doctrine here, this claim must be dismissed as time barred.

VII. DISMISSAL OF CLAIM FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff's final claim must be dismissed because injunctive and declaratory relief are not independent causes of action, rather they are mere remedies. *Marchetti v. Superior Court of California*, 2016 U.S. Dist. LEXIS 120899, *25 (N.D. Cal. Sept. 7, 2016). Because the complaint fails to state a claim under which any relief can be granted, Plaintiff is not entitled to either injunctive or declaratory relief.

CONCLUSION

For the foregoing reasons, VWGoA respectfully requests that this action be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), 12(b)(1) and 9(b), together with costs and disbursements, and such other relief as the Court deems just and proper.

Dated: August 14, 2017

Respectfully submitted,

Herzfeld & Rubin, P.C.

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